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9 IN THE UNITED STATES DISTRICT COURT

10 FOR THE NORTHERN DISTRICT OF CALIFORNIA

11

12 UNITED STATES OF AMERICA, Nos. CR 14-00306 WHA
CR 08-00222 WHA

13 Plaintiff,

14 v.

15 LUKE BRUGNARA,

16 Date: September 3, 2014
Time: 11:00 a.m.
17 Defendant / Dept: WHA

18 The United States has filed a Motion Regarding Attorney-Client Privilege and Advice of
19 Counsel. Docket Nos. 47 & 323. The Government first asks the Court to find that there has
20 been a waiver of privilege with respect to "communications between [Mr. Brugnara] and any of
21 his lawyers, that were made between the delivery of the artwork on April 7, 2014" and May 28,
22 2014 that concern "the defendant's possession and retention of the artwork." The Government
23 then asks the Court to require the defendant to give notice of any intent to raise an advice of
24 counsel defense at trial. Defendant opposes both of these requests for the reasons set forth
25 below.

1 **A. The Defendant Has Not Waived All Communications With Any of His Attorneys**
 2 **Between April 7, 2014 and May 28, 2014 That Concern His Possession and**
 3 **Retention of the Artwork**

4 **1. The Government's Broad Assertions of Waiver By Voluntary Disclosure of**
 5 **Privileged Communications Are Not Supported by The Limited Privileged**
 6 **Communications Mr. Brugnara Made**

7 The government's broad claim of waiver is belied by the limited instances in which it
 8 cites statements by him disclosing the substance of any confidential communications.

9 First the government cites Mr. Brugnara's statements before Magistrate Judge Corley on
 10 May 30, 2014 in which he said that he contacted Brandon LeBlanc and Harris Taback and "he,"
 11 apparently referring to Mr. Taback, said to "get a release signed." The government then cites
 12 defendant's statement at the June 3, 2014 hearing in which he stated that Msrrs. LeBlanc and
 13 Taback "all said the same thing. . . . Get those boxes out of your garage." As the Court knows,
 14 both Brandon LeBlanc and Harris Taback are attorneys who represented Mr. Brugnara in
 15 defending the two federal criminal cases against him.

16 These limited instances of arguable disclosures do not come close to supporting the
 17 government's broad assertion of waiver for all attorney on all communications from April 7 to
 18 May 28, 2014. Even if the court were to find these were disclosures of confidential legal
 19 communications, any finding of a waiver would have to be limited to a finding that Mr. Brugnara
 20 waived his privilege with respect to whether (1) Mr. Taback said to get a release signed, and (2)
 21 whether either Msrrs. LeBlanc or Taback said to get the boxes out of this garage.

22 The government then cites Mr. Brugnara's testimony at the Form 12 hearing on June 17,
 23 2014 as supporting a broad waiver of all attorney-client communications from April 7 to May 28,
 24 2014 on his possession and retention of the boxes. No such broad waiver occurred. First, from
 25 the transcript it plainly appears that the first statement cited by the government (Gov Memo pp.
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 27
 28

1 4-5) were what Mr. Brugnara instructed his counsel to do. He said the “approach” of saying the
 2 art was a “gift” was “posturing” and that his instructions to his attorney were to “take that
 3 position . . . get te crap out of my garage . . . [and] make sure you get a release.” This was not
 4 legal advice from counsel; it was his instruction to is counsel as to how to proceed.
 5

6 The government then claims that Mr. Brugnara’s statement that “certain parties” told him
 7 not to open boxes, etc., “plainly referr[ed] to “statements made by his attorneys.” In fact, Mr.
 8 Brugnara did not identify who made these statements, and the government did not inquire.
 9 Accordingly, there was no waiver of the attorney-client privilege because no privileged
 10 communications were disclosed. There is no basis other than conjecture to make a factual
 11 finding that these statements referred to a privileged communications, as opposed to
 12 conversations with a friend or family.
 13

14 **B. There Is No Legal Basis On Which To Find A Waiver Based On Mr. Brugnara
 15 Putting His Legal Advice In Dispute Because This Is A Criminal Case and Mr.
 16 Brugnara Has Not Put His Legal Advice In Dispute Before A Jury**

17 The government cites several inapposite Ninth Circuit cases to support a broad claim that
 18 the attorney client privilege is waived when a party puts the legal advice received at issue in a
 19 dispute.

20 First, this is not a civil case, but rather, a criminal one. Unlike Chevron v. Pennzoil 974
 21 F. 2d 1156 (9th Cir. 1992) one of the cases cited by the government, until this case goes to trial,
 22 Mr. Brugnara does not have to put any defenses on the table. Indeed, even at trial, he does not
 23 have to raise an affirmative legal “defense.” The government bears the entire burden of proof in
 24 this case. Mr. Brugnara could, if he chooses, have counsel not even engage in a single cross
 25 examination, not put on a single witness, and not take the stand in his own behalf, and instead,
 26 simply rest after the government’s case and argue the government had not met its singularly
 27 simply rest after the government’s case and argue the government had not met its singularly
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1 stringent burden of proof.

2 Until this case goes to trial, in other words, Mr. Brugnara cannot put any advice he
 3 received at issue. Mr. Brugnara's testimony at the Form 12 hearing will not be presented to the
 4 jury unless the government seeks to introduce it. Mr. Brugnara's statements in magistrate court
 5 will not be presented to the jury unless and until the government seeks to admit them. The only
 6 "dispute" in a criminal case is before the jury, and this case has not reached that stage.
 7
 8 Defendant concedes that if he were to testify at trial that he might put the legal advice he received
 9 at issue. Of if he were to call certain witnesses or present certain evidence at trial it might even
 10 be possible for him to put his legal advice at issue sufficiently to find a waiver even if he did not
 11 testify.
 12

13 Just because the government's evidence may involve communications between Mr.
 14 Brugnara's counsel and Ms. Rose's counsel does not make any legal advice Mr. Brugnara
 15 received "in dispute." "[P]rivate privileged communications do not become discoverable simply because
 16 they are related to issues raised in the litigation." Southern Calif. Gas Co. v. Public Utilities
Comm'n, 50 Cal. 3d 31, 784 P.2d 1373, 1381, 265 Cal. Rptr. 801 (Cal. 1990) (internal quotation
 17 omitted). When the sought-after evidence is "only 'one of several forms of indirect evidence'
 18 about an issue," the privilege has not been waived. Hamilton v. Lumsden (In re Geothermal
Resources Int'l, Inc.), 93 F.3d 648, 653 (9th Cir. 1996) (per curiam) (quoting Rockwell Int'l Corp.
v. Superior Court, 26 Cal. App. 4th 1255, 1268 (1994) (quoting Mitchell v. Superior Court, 37
 19 Cal. 3d 591, 691 P.2d 642, 650, 208 Cal. Rptr. 886 (Cal. 1984))).
 20
 21

22 The government also cites United States v Amlani, 169 F.3d 1189 (9th Cir. 1999) and
 23 Bittaker v. Woodford, 331 F.3d 715 (9th Cir. 2003)(en banc) in support of its implied waiver
 24 argument. Neither case is on point. Amlani was a case in which the defendant was convicted at

1 trial, and then argued in the Ninth Circuit that the government improperly caused him to change
 2 counsel before trial by disparaging counsel in front of the defendant. The Ninth Circuit
 3 remanded to the district court to determine the reason the attorney had been terminated, and the
 4 district court properly found an implied waiver of attorney-client communications limited to the
 5 reasons for the termination. In Bittaker the habeas petitioner raised an ineffective assistance of
 6 counsel claim, and the court properly found a limited implied waiver of communications relating
 7 to the claimed assistance.

9 Finally, if the court finds there has been an implied waiver of attorney client
 10 communications, the court should bear in mind the Ninth Circuit's admonition that the "court
 11 must impose a waiver no broader than needed to ensure the fairness of the proceedings before it.
 12 Because a waiver is required so as to be fair to the opposing side, the rationale only supports a
 13 waiver broad enough to serve that purpose. Courts, including ours, that have imposed waivers
 14 under the fairness principle have therefore closely tailored the scope of the waiver to the needs of
 15 the opposing party in litigating the claim in question." Bittaker, 331 F.3d at 720 (citing Kerr v.
 16 U.S. Dist. Court, 426 U.S. 394 at 405, 48 L. Ed. 2d 725, 96 S. Ct. 2119(1976) (recognizing the
 17 need to ensure that the "balance between petitioners' claim[] of . . . privilege and plaintiffs'
 18 asserted need for the documents is correctly struck")

21 Moreover, before a finding of implied waiver is made, the "holder of the privilege may
 22 preserve the confidentiality of the privileged communications by choosing to abandon the claim
 23 that gives rise to the waiver condition." Bittaker, 331 F.3d at 721.

25 **C. There Is No Legal Basis To Require Notice of A Good Faith Defense**

26 Finally, the government asks to court to impose a "notice" requirement on the defendant
 27 of any intention to raise an advise of counsel defense. The Federal Rules of Criminal Procedure
 28

1 set forth the defenses for which a defendant must give advance notice to the government. Rule
2 12.1 requires notice of an alibi defense. Rule 12.2 requires notice of an insanity defense. Rule
3 12.3 requires notice of a public authority defense. There is no rule requiring notice of a good
4 faith defense, or of a reliance on legal counsel defense. The government cites no cases for the
5 authority that the court has the authority to impose such a notice requirement, when it is
6 conspicuously absent from the Rules, because the court does not have the authority to impose
7 such a notice requirement.

9 CONCLUSION

10 Based on the foregoing, defendant asks the court to deny the government requested relief.
11
12 If it grants any part of it, then any legal communications subpoenaed by the government should
13 be reviewed in camera by the court to sort through all privileged communications and determine
14 which, if any, come within the scope of the waiver found by the court.

15 DATED: August 26, 2014

16 Respectfully,

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19 By: /S/Erik Babcock
20

ERIK BABCOCK
21 Attorney for Defendant BRUGNARA